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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ADVERTISING COMPANY and UNIVERSAL OUTDOOR, INC.,

Petitioners,

v.

CITY OF ROLLING MEADOWS, an Illinois Municipal Corporation,

Respondent.

Petition for Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a municipality avoid constitutional scrutiny by entering into and enforcing private agreements in its "proprietary," as opposed to "governmental," capacity?

2. May a municipality which owns land in a development subject to a restrictive covenant completely prohibiting advertising signs, except those identifying the name, business, and products of the business occupying the premises, enforce the restrictive covenant through the Illinois state courts, consistent with the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment?

LIST OF PARTIES

City of Rolling Meadows, an Illinois municipal corporation

(Plaintiff in the Circuit Court of Cook County, Illinois; Appellee in the Appellate Court of Illinois, First Judicial District, Fifth Division; Respondent in the Supreme Court of Illinois)

National Advertising Company

Universal Outdoor, Inc.

P.K. Neuses, Inc.

National Bank of Arlington Heights, Trustee Under Trust Agreement dated May 13, 1971, and Known as Trust No. A176

Citizens Bank and Trust Company, Trustee Under Trust No. 66-4801

"Unknown Others"

(Defendants in the Circuit Court of Cook County, Illinois; Appellants in the Appellate Court of Illinois, First Judicial District, Fifth Division; Petitioners in the Supreme Court of Illinois)

STATEMENT PURSUANT TO RULE 29.1

Petitioner National Advertising Company is a wholly-owned subsidiary of 3M Company, also known as Minnesota Mining and Manufacturing Company.

Petitioner Universal Outdoor, Inc. has no parent or subsidiary corporations within the meaning of Rule 29.1.

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NATIONAL ADVERTISING COMPANY and UNIVERSAL OUTDOOR, INC.,

Petitioners,

v.

CITY OF ROLLING MEADOWS, an Illinois Municipal Corporation,

Respondent.

Petition for Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

PETITION FOR WRIT OF CERTIORARI

The petitioners are National Advertising Company and Universal Outdoor, Inc. The petitioners seek issuance of a writ of certiorari to the Appellate Court of Illinois, First Judicial District.

OPINION BELOW

The opinion of the Appellate Court of Illinois is reported as *City of Rolling Meadows v. National Advertising Co.*, 228 Ill. App. 3d 737, 593 N.E.2d 551 (1991). It is reprinted in the Appendix at A1-A16. The order of the Illinois Supreme Court denying National Advertising's petition for leave to appeal is reproduced in the Appendix at A17. The order of the Illinois Supreme Court denying Universal's petition for leave to appeal is reproduced in the Appendix at A18.

JURISDICTION

The Appellate Court of Illinois entered judgment on November 27, 1991 and denied National Advertising's and Universal's petitions for rehearing on June 4, 1992. The Supreme Court of Illinois denied National Advertising's and Universal's petitions for leave to appeal on October 7, 1992. A17-A18. Petitioners invoke the jurisdiction of the Court under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the First Amendment to the United States Constitution and Section One of the Fourteenth Amendment to the United States Constitution. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I. Section One of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioners are engaged in the advertising business as the owners of outdoor advertising displays. After constructing a sign, petitioners offer the display area for lease to "all comers" as a forum to communicate commercial, political, public service, and other noncommercial messages. R.C238-39.[1]

P. K. Neuses, Inc., First National Bank of Arlington Heights, as Trustee under a Trust Agreement dated May 13, 1971 and known as Trust No. A176, and Citizens Bank and Trust Company, Trustee under Trust No. 66-4801, own several properties in a development known as the Northwestern Industrial Park in the City of Rolling Meadows, Illinois. R.S495-97. The petitioners leased the properties in the Industrial Park for the purpose of erecting and maintaining one sign on each of the properties. R. S499. The signs were intended to be visible from Route 53, a high-speed, multi-lane, limited access, federal-aid primary highway which passes through the center of the Industrial Park. R.S531-35.

The respondent, the City of Rolling Meadows, Illinois, is a municipal corporation. The City owns property in the Industrial Park. R.C236-37.

Previous Litigation

This dispute began in 1983 when the City denied petitioner National Advertising permits to erect the signs

[1] Petitioners regularly make space available to advertisers of noncommercial speech. These advertisers include the March of Dimes, the American Red Cross, the Boy Scouts of America, the League of Women Voters, and like organizations. R.S98-100.

based upon the City's then-existing zoning ordinance. R. S605; Def. Trial Ex. 11. On December 14, 1983, National Advertising filed suit against the City in the United States District Court for the Northern District of Illinois. R.C293-94,S107. After three years of litigation, the United States Court of Appeals for the Seventh Circuit held that the zoning ordinance was preempted by state law and invalidated the portions of the ordinance that prevented issuance of the requested permits. *National Advertising Co. v. City of Rolling Meadows*, 789 F.2d 571 (7th Cir. 1986).

In accordance with the Seventh Circuit's decision, in May 1986 the petitioners re-applied for permits to erect the signs. R.S605, Def. Trial Ex. 14, 15. The City eventually amended its zoning ordinance to allow the signs sought by the petitioners. R.C65-66. The City did not, however, issue the permits, and in September 1986, the petitioners brought a mandamus action in the Circuit Court of Cook County, Illinois to compel the issuance of permits for the signs. R.C71. Thereafter, the City issued two permits to National Advertising, and one permit to Universal, allowing the petitioners to erect the signs. R.S499, S605, Def. Trial Ex. 14, 15. The City refused to process a second building permit application requested by Universal. R.S498.

The Restrictive Covenant

After the petitioners had almost completed construction of the signs, on December 12, 1986, the City filed a Complaint for Declaratory Judgment and Injunctive Relief in the circuit court asking the court to declare a certain restrictive covenant binding upon the petitioners. R.C2-C5. The City claimed that the restrictive covenant, the existence of which had not been disclosed in the earlier litiga-

tion, prohibited all "off-premise signs" within the Industrial Park—the type of signs for which the City had issued building permits to the petitioners. R.C95,S499. Clause III K of the restrictive covenant provides:

> No billboards or advertising signs except those identifying the name, business and products of the person or firm occupying the premises shall be permitted.

R.S500.

The City also contended that Clause III C prohibited the petitioners' signs. That clause provides:

> Improvements erected on property subject to this declaration as described in Clause I hereof, shall not exceed forty-five (45) feet in height; provided, however, that water towers or tanks, standpipes, penthouses or structures for housing elevators or elevator equipment, stairways, ventilating fans or similar equipment required to operate and maintain the buildings, fire or parapet walls, skylights, tanks, cooling or other towers, wireless, radio or television masts, roof signs, flagpoles, chimneys, smokestacks, gravity flow storage and/or mixing towers or similar structures may exceed this height with the written approval of the Park.[2]

Id.

The petitioners filed answers which raised, among other defenses, the defense that the enforcement of the restrictive covenant would contravene the First and Fourteenth

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[2] The reference to the "Park" means Northwestern Industrial Park, Inc., the corporation which initially owned the Industrial Park and which was constituted to enforce the Covenant's restrictions. R.S501, S528. In 1966, the Industrial Park Corporation was dissolved, leaving no governing body to administer the restrictive covenant. R.S501, S540-42.

Amendments to the United States Constitution. R.C565. Universal also filed a separate action for mandamus which was consolidated with the City's claim. R.C284. The petitioners moved for summary judgment on their constitutional defenses, but the motion was denied on August 4, 1988. R.C1003. The City later moved for summary judgment, and, on July 31, 1989, the City's motion was granted on all grounds except limited state law issues concerning the validity of the covenant. R.S14. Agreeing with the City, the court held that the City, as a landowner within the Industrial Park, had an "absolute right" to enforce the restrictive covenant:

> I find that the Village of Rolling Meadows as owner of the property, which is impressed with the covenant at issue, has an absolute right as an owner of this property to enforce the covenant insofar as it has been violated by other property owners, to-wit in this case the lessor, who has subleased the property for the purpose of erecting the commercial sign.

Rep. Proc. 7/31/89 at 20.[3]

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[3] The court also drew an interesting analogy:

> THE COURT: I am your neighbor, and I live next door to you in the same subdivision with the same covenant, and I see you painting your garage, ["C]hew Copenhagen [S]nuff[."] And I call you up and I say, I am sorry, I can't agree to your painting ["C]hew Copenhagen [S]nuff["] on your garage. We have this covenant which prohibits advertising except street signs for instance or address signs, which is the same position that the City of Rolling Meadows is in. They are owners of a piece of property in the subdivision subject to the covenant, and they are saying as your neighbor in the Copenhagen [S]nuff example is saying, I don't want you putting a Copenhagen [S]nuff sign on your garage.

Id. at 13-14.

The Trial

The case proceeded to a bench trial in October 1989. The City asserted standing to enforce the covenant based on its ownership of property within the covenanted area. R.S495, S498. The petitioners relied on the defenses of "changed conditions" and "abandonment," the only defenses which had not been disposed of by interlocutory orders. R.C1083.

The trial disclosed that the restrictive covenant was imposed in 1957. At that time, the Industrial Park consisted of farmland and several homesteads. R.C1139, Rep. Proc. 10/10/89 at 30-35. For unknown reasons, the covenant was not recorded against all of the property which now comprises the Industrial Park, although at least one of the excluded properties was owned by the developers and platted as part of the park. R.S605. Located in the center of the Industrial Park, one of these parcels contains an advertising sign constructed by petitioner National Advertising that is not at issue in this case. Rep. Proc. 10/10/89 at 32-33.

Since approximately 1960, the City has owned property in the Industrial Park on which it built a water tower. The water tower is eighty feet tall, and at the time of trial, it had a 700 square foot sign painted on it reading "Rolling Meadows." On other occasions, the tower has carried signs reading "Northwestern Industrial Park" or "25th Anniversary." R.S178, S495, S498-500, S605, Def. Trial Gr. Ex. 4C. Because the City failed to obtain the written approval required by the restrictive covenant, neither the water tower itself nor the signs upon it conform to the restrictive covenant.

In 1963, 20.64 acres of the Industrial Park—over 10% of the Industrial Park's 201 acres—were condemned to

allow for construction of Route 53, a multi-lane, high-speed, controlled access highway.[4] R.S197, S501-02, S605; Def. Trial Ex. 8. The portion of Route 53 which runs through the Industrial Park was open to traffic in 1966. According to 1986 traffic counts, Route 53 carried approximately 142,200 vehicles per day in the vicinity of the Industrial Park, five times the 1957 total traffic volume on the main thoroughfares surrounding the Industrial Park. R.S198-99.

At the close of evidence, on October 12, 1989, the circuit court entered judgment against the petitioners. R. S604. The court "ordered, adjudged and decreed" that the restrictive covenant was "valid and legally enforceable," and ordered that defendants "at their expense remove the signs within 90 days." *Id.*

The Opinion of the Appellate Court of Illinois

Petitioners then appealed to the Appellate Court of Illinois, First Judicial District, Fifth Division. In an opinion dated November 27, 1991, the appellate court affirmed, in its entirety, the judgment of the circuit court. The court refused, however, to directly address the petitioners' constitutional defense:

> National and Universal rely on *Shelley v. Kraemer* (1948), 334 U.S. 1, 92 L. Ed. 2d 1161, 68 S. Ct. 836, where the Supreme Court held it would not enforce a restrictive covenant that would violate constitutional rights. They argue that the restrictive covenant prohibiting off-premise billboards violates their right to free speech relying on *Metromedia, Inc. v. City*

[4] The Industrial Park comprises over 5% of the total area of the City. Appellee's Brief p. 40.

of San Diego (1981), 453 U.S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882. In *Metromedia*, the Supreme Court held that an ordinance permitting on-premise commercial advertising but prohibiting other commercial advertising and noncommercial advertising violated the right to freedom of speech. The court found that the ordinance could value commercial messages relating to on-premise business over commercial messages relating to off-premise business. However, the ordinance could not protect commercial speech more than noncommercial speech. "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." *Metromedia*, 453 U.S. at 513, 69 L. Ed. 2d at 818, 101 S. Ct. at 2895.

National and Universal argue that under *Metromedia* the restrictive covenant unconstitutionally prohibits the display of noncommercial messages because it allows only the display of on-premise commercial messages. They urge this court to hold that enforcement of the restrictive covenant violates freedom of speech.

National and Universal ignore, however, the fact that their proposed billboards violate the height restrictions of the covenant. The covenant prohibits improvements over 45 feet high. The three billboards which National and Universal constructed were between 49 feet and 56 feet high, exceeding the limitation. Regardless of the message that their billboards may carry, whether it is commercial or noncommercial, there is no question that the billboards violate the height restriction of the covenant. As a result, whether enforcement of the covenant would violate freedom of speech is not at issue. Even if this court were to find that the restrictive covenant violated

the freedom of speech, the height restriction of the covenant would still bar National's and Universal's billboards.

A14-15.

The petitioners filed petitions for leave to appeal to the Illinois Supreme Court. The petitioners asserted, among other defenses, that enforcement of the restrictive covenant violates the First Amendment, as applied to the states by the Fourteenth Amendment. In an order dated October 7, 1992, the Illinois Supreme Court denied the petitions. A17-18.

REASONS TO GRANT THE WRIT

This case raises the question of a municipality's ability to regulate expressive conduct through the enforcement of a restrictive covenant, rather than by statute or ordinance. While the Court has addressed the constitutional restraints placed upon the enforcement of restrictive covenants—*e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948)—as well as the ability of municipalities to regulate speech—*e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981)—the Court has never considered the ability of a municipality to avoid constitutional scrutiny through the utilization of restrictive covenants. This case, therefore, presents the Court with the opportunity to demonstrate to municipalities that they cannot do indirectly, through the use of a restrictive covenant, what they cannot do directly through ordinance.

The case, on its face, involves but a few signs along a highway in an industrial park. But when one considers the effect of the City's actions under the restrictive covenant, and the City's refusal to offer any justification for its actions, the need for this Court's attention is obvious.

If the lower courts' rulings are permitted to stand, the City will have assumed tyrannical powers over the free speech rights of those owning land in the Industrial Park. For example:

- Under the restrictive covenant, which the Illinois courts have found wholly enforceable, the City cannot prevent signs "identifying the name, business and products" of a resident of the Industrial Park, but can seek to enjoin residents from placing political signs in the park.
- Neither the restrictive covenant nor the lower courts' opinions or orders require the City to exercise its rights under the restrictive covenant in a non-discriminatory fashion. The City could, therefore, seek the removal of messages it disagrees with, leaving alone those it likes.
- While the City has discretion under the restrictive covenant to seek the removal of political and other noncommercial signs as it sees fit, it has no discretion to seek the removal of "on-site" commercial advertising.

While these results could hardly be more foreign to First Amendment principles, the mechanism by which they may be accomplished received the complete sanction of the Illinois state courts. One can safely assume that other municipalities, having learned of the City's success here, will adopt similar schemes to avoid constitutional challenge.

The principles involved are more significant than the plain violation of the free speech rights of the residents of a significant portion of a small community. Allowing a municipality to exercise its privileges as a landowner pursuant to a restrictive covenant without applying full constitutional scrutiny will jeopardize other constitutional protections. For example, there is nothing to prevent Illi-

nois municipalities from joining with other landowners to create covenants which restrict the exercise of religious, voting, or abortion rights. Municipalities could even attempt to achieve these goals by conditioning the grant of privileges, such as building permits, on the applicant's agreement to enter into a restrictive covenant. These scenarios are egregious, and they are not distinguishable in substance from this case.

The Court should also grant certiorari because the petitioners have never received a reasonable judicial evaluation of their First Amendment claim. While certiorari is not intended to redress every wrong or bad result, the Court should not ignore such a clear violation of the petitioners' right to free speech. The courts below were shockingly insensitive to petitioners' constitutional rights: the circuit court felt that the Constitution did not apply because the City was acting pursuant to a "private agreement"; the appellate court consciously avoided the issue; and the Illinois Supreme Court refused to hear the petitioners' complaints. This Court is, therefore, the last opportunity to remedy a clear constitutional violation.

I.

THE COURT SHOULD GRANT THE WRIT TO CLARIFY THAT ALL ACTIONS OF THE STATE, WHETHER TAKEN PURSUANT TO STATUTE OR PURSUANT TO A "PRIVATE AGREEMENT," ARE STATE ACTIONS.

In the appellate court, the City argued that because "no ordinance or law is at issue in this case," the attempted enforcement of the restrictive covenant was not subject to constitutional restraint. Appellee's Brief p. 31. According to the City, "since the City owns the property in its proprietary capacity, the case will turn on rules of prop-

erty law, not constitutional law." *Id.* at 36. The circuit court agreed:

> [T]he covenant in the Court's opinion is a reasonable exercise of a land [owner's] prerogative in attempting to protect property which is the subject of the covenant from the proliferation of signs of questionable taste, sign location upon property, and to preserve immunities [sic] insofar as the property is concerned.
>
> In my opinion so that the record is clear historically the constitution[al] protections o[f] free speech contained within our constitution were designed to protect political utterances, not design[ed] to protect every conceivable type of utterance to be impressed over every conceivable type of location without regard to the interest of the property owners concern[ed], and this has come about by reason of the judicial extremity or activism, if you want to be kind, of the late Justice Douglas, and in the instant case, it's the Court's opinion [that] property owners who are owners of property which is subject to [a] covenant designed to protect the property owners such as this covenant clearly are entitled to the protection of the Court. Profit and half dressed women on signs is not in my opinion, in this court's opinion, something that a property owner should be subjected to on the whim of a commercial owner.

Rep. Proc. 8/2/88 at 21-22.

It is difficult to conceive of a more patent misunderstanding of the state action doctrine. Since *The Civil Rights Cases*, 109 U.S. 3 (1883), the Court has recognized that the Fourteenth Amendment shields the individual from governmental, not private, action. *The Civil Rights Cases* also recognize, however, "that the Amendment makes void 'state action of every kind' which is inconsistent with the guaranties therein contained, and extends to all manifestations of 'state authority in the shape of laws, customs,

or judicial or executive proceedings.' " *Shelley v. Kraemer*, 334 U.S. 1, 14-15 (1948) (quoting *The Civil Rights Cases*, 109 U.S. at 11, 17).

State action is not, of course, as narrow a doctrine as the City contended or as the circuit court held. It applies to all actions of the state, not just those where the state acts in the usual course, *e.g.*, pursuant to statute or regulation. The question is whether the conduct can be "fairly attributable to the state." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Whether this is evaluated under the "overall interdependence" or "symbiotic relationship" test of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), or the "close nexus" test of *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), makes no difference in this case. Nor does the fact that the City is engaged in a "proprietary" function with respect to its land in the Industrial Park, as opposed to a typical "governmental" function, make any difference. *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (actions taken by city as manager of a city-leased theater subject to constitutional restraint).

By misapprehending the state action doctrine, the Illinois courts have allowed the City to obtain, through a civil suit, the regulation of private property in a manner at odds with the Constitution. The Court's reasoning in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), applies:

> What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.

Id. at 277. In finding that the Alabama law of libel violated the First and Fourteenth Amendments, the Court in *Sullivan* recognized that private civil actions "may be

markedly more inhibiting" to First Amendment freedoms than a direct prohibition. *Id.*

Sullivan cited with approval *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (Ill. 1923). The City of Chicago brought a libel case against a local newspaper alleging damages from newspaper articles which were critical of the City's financial management. The City based its claim on its status as a "property owner" and "manager" of various public works, and claimed damage to the City's credit standing. The Illinois Supreme Court unanimously rejected the City's argument that it was entitled to pursue a civil claim solely in its proprietary capacity without regard to its identity as a governmental body:

> All organized governments own and operate more or less property, and certain proprietary rights have long been recognized as necessary for the welfare of the inhabitants of the municipality. Municipal corporations, however, exist primarily for governmental purposes, and they are permitted to enter the commercial field solely for the purpose for subserving the interests of the public which they represent. A city is no less a government because it owns and operates its own water system, its own gas and electric system and its own transportation system.
>
> . . . .
>
> While for certain limited purposes it is often said that a municipality owns and operates its public utilities in its capacity as a private corporation and not in the exercise of its powers of local sovereignty, *yet because of its proprietary rights it does not lose its governmental character.*

307 Ill. at 607-08, 139 N.E. at 90-91 (emphasis supplied).

Here, the City reached out to strike down an expressive activity it did not like. The City brought the action, the City prosecuted the action, the City obtained the

court order commanding petitioners to take down the signs, and the City defended all appeals. Since the City has acted, there was "state action," and the City was required to conform its activities to the requirements of the Constitution.[5]

II.

THE COURT SHOULD GRANT THE WRIT BECAUSE THE LOWER COURTS' HOLDINGS INVITE MUNICIPALITIES TO REGULATE CONSTITUTIONALLY-PROTECTED ACTIVITIES THROUGH RESTRICTIVE COVENANTS.

As confirmed by the number of lower court cases that have addressed the subject since *Metromedia*, *supra*, municipalities continue to search for ways to constitutionally regulate billboards. In spite of *Metromedia's* guidance, some municipalities still have difficulty formulating ordinances which pass constitutional muster. *See, e.g., National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir.), *cert. denied*, 111 S. Ct. 146 (1990); *Burkhart Advertising, Inc. v. City of Auburn*, 786 F. Supp. 721 (N.D. Ind. 1991); *Jackson v. City Council of Charlottesville*, 659 F. Supp. 470 (W.D. Va. 1987); *Metromedia, Inc. v. Mayor & City Council of Baltimore*, 538 F. Supp. 1183 (D. Md. 1982). Courts, however, have generally enforced restrictive

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[5] Even if the City had not been a litigant, the involvement of the state court in enforcing the restrictive covenant would have provided the necessary state action. The concerns of *Shelley v. Kraemer* are certainly implicated where a property owner seeks to engage in protected activity on his property and a state court is asked by a third party to enjoin the activity. *But see Linn Valley Lakes Property Owners Ass'n v. Brockway*, 250 Kan. 169, 824 P.2d 948, 951 (1992) (enforcement of a restrictive covenant banning "for sale" sign not "state action" under *Shelley* because "there is nothing constitutionally impermissible per se in a private agreement restricting signs in a residential neighborhood").

covenants banning advertising signs, even in the face of constitutional challenge. *See, e.g., Murphy v. Timber Trace Ass'n*, 779 S.W.2d 603 (Mo. App. 1989) (First Amendment issue held waived); *Lynch v. Urban Redev. Auth. of Pittsburgh*, 91 Pa. Commw. 260, 268, 496 A.2d 1331, 1336 (1985) (rejecting First Amendment claim because "the authority did not ban advertising or signs from the Lynches' property, it only rejected a specific proposal" for a billboard).

The scheme adopted by the City in this case is an inviting method for municipalities to suppress billboards. If a municipality can avoid constitutional scrutiny through the use of a restrictive covenant, as the City has done here, it will be but a short time until other municipalities follow the lead. It is imperative that the practice be declared unconstitutional before it becomes widespread.

A. Enforcement of the Restrictive Covenant Is Unconstitutional.

The petitioners never obtained a reasonable judicial evaluation of the constitutionality of the City's methods. That the City acted unconstitutionally is, however, readily apparent. First, contrary to the appellate court's analysis, the fact that the signs may have violated the restrictive covenant's height restriction does not end the constitutional analysis. Second, because the City failed to offer any justification for enforcement of the restrictive covenant, the restrictive covenant fails the well-established test first set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Third, by favoring a certain type of commercial speech over non-commercial and other types of commercial speech, the restrictive covenant fails for the same reason the ordinance in *Metromedia* failed.

The Illinois Appellate Court avoided the constitutional question by holding that "even if this court were to find that the restrictive covenant violated the freedom of speech, the height restriction of the covenant would still bar National's and Universal's billboards." A15-16. The constitutional question cannot, however, be so easily dismissed. Even a neutral restriction on speech, such as a height regulation, must be justified to some extent to pass constitutional muster. *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 649 (1981). The City offered no justification for enforcing the height restriction.

More importantly, even if the height restriction were constitutional, the court was still required to address the patent invalidity of the restrictive covenant's overbroad attempt at content-based regulation. This was made clear in *Metromedia*:

> We have held that the overbreadth doctrine, under which a party whose own activities are unprotected may challenge a statute by showing that it substantially abridges the First Amendment rights of parties not before the court, will not be applied in cases involving "commercial speech." *Bates v. State Bar of Arizona*, 433 U.S. 350, 381, 97 S. Ct. 2691, 2707, 53 L. Ed. 2d 810 (1977). However, we have never held that one with a "commercial interest" in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others. Were it otherwise, newspapers, radio stations, movie theaters and producers—often those with the highest interest and the largest stake in a First Amendment controversy—would not be able to challenge government limitations on speech as substantially overbroad.

453 U.S. at 505 n.11.

The restrictive covenant is invalid on its face. In *Central Hudson, supra*, the Court established a test for gauging

the validity of governmental restrictions on legitimate—*i.e.*, lawful and non-misleading—commercial speech. Under *Central Hudson*, a restriction is valid only if it seeks to implement a substantial governmental interest, directly advances that interest, and reaches no further than necessary to accomplish the objective. 447 U.S. at 563-66. While the courts have generally deferred to a municipality's justifications and methods, they have required *some* justification.

Here, the City failed to offer *any* justification for its enforcement of the restrictive covenant. Instead, the City argued that it was not required to support its actions because it was merely acting as a private landowner enforcing its property rights: "[s]ince the City owns this property in its proprietary capacity, the case will turn on rules of property law, not constitutional law." Appellee's Brief p. 36. If the Constitution requires anything, however, it at least requires that there be some public necessity for an infringement of a guaranteed right. *See National Advertising Co. v. Town of Babylon*, *supra*, 900 F.2d at 556 (ordinances which failed to identify any particular governmental interests sought to be advanced by restricting signs held unconstitutional).

There was no public purpose behind the City's enforcement of the restrictive covenant. At the time it brought this litigation, the City had comprehensive zoning laws governing the placement of billboards. Under these laws—which one would have to assume embodied the legitimate interests of the City as well as a reasoned method of enforcing those interests—the signs prepared by the petitioner were, in all respects, legal. In fact, prior to learning of the restrictive covenant, the City had issued building permits for the signs at issue. Since the City never attempted to justify the enforcement of the restrictive covenant, and since the enforcement could not be justified un-

der the *Central Hudson* test, the restrictive covenant is unconstitutional on its face.

Finally, even if the restrictive covenant could survive scrutiny under *Central Hudson*, it would fail under *Metromedia*. In *Metromedia*, the Court addressed the constitutionality of a local ordinance which permitted on-site commercial advertising but forbade all off-premises communications, including noncommercial speech, unless permitted by one of several specified exceptions. In concluding that the general ban on signs carrying noncommercial advertising violated the Constitution, a plurality of the Court stated:

> [O]ur recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech. San Diego effectively inverts this judgment, by affording a greater degree of protection to commercial than to noncommercial speech. There is a broad exception for onsite commercial advertisements, but there is no similar exception for noncommercial messages. The use of on-site billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. . . Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

453 U.S. at 513.

In this case, the restrictive covenant permits on-site, business-related signs but prohibits all off-premises advertising signs. The restrictive covenant uses virtually the

same language as that found unconstitutional in the ordinance at issue in *Metromedia*. Like the San Diego ordinance, the restrictive covenant reflects a judgment that information relating to products manufactured or offered for sale on the premises is somehow of greater value than noncommercial information. This preferential treatment of commercial speech over noncommercial speech was precisely the evil found to violate the First and Fourteenth Amendments in *Metromedia*. *See also Burkhart Advertising, Inc. v. City of Auburn*, 786 F. Supp. 721 (N.D. Ind. 1991); *Metromedia, Inc. v. Mayor & City Council of Baltimore*, 538 F. Supp. 1183 (D. Md. 1982); *Cf. Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992). Under any reasonable view of the case, the City's enforcement of the restrictive covenant is unconstitutional.

B. The Court Should Grant the Writ To Prevent Municipalities from Regulating Through Restrictive Covenants.

The violation of the petitioners' constitutional rights, as well as the potential violation of the constitutional rights of all the landowners in the Industrial Park, warrants protection by the Court. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). There is, however, even greater reason to hear this case: a clear danger exists that the type of scheme utilized by the City here could be adopted on a widespread basis. Municipalities continue to seek, rightly or wrongly, constitutional methods to regulate billboards. Municipalities also own large areas of land for buildings, utilities, transportation systems, parks, and housing developments. By joining with other like-minded landowners, broad restraints on expressive activity could be created through restrictive covenants. The result in this case does nothing but encourage such unions.

This case unquestionably presents a scenario capable of repetition. Many cases have addressed the judicial enforcement of restrictive covenants impinging on free speech rights, but have either ignored or found a way around the First Amendment issues. *See, e.g., Murphy v. Timber Trace Ass'n*, 779 S.W.2d 603 (Mo. App. 1989) (First Amendment issue held waived); *Cashio v. Shoriak*, 481 So. 2d 1013 (La. 1986) (First Amendment issue not reached; restrictive covenant construed to not apply to plaintiffs' signs); *Gauthier v. Robinson*, 122 N.H. 365, 444 A.2d 564 (1982) (no First Amendment issue raised); *Knolls Ass'n v. Hinton*, 71 Ill. App. 3d 205, 389 N.E.2d 693 (1979) (same). Included are cases in which a governmental entity enforced the restrictive covenant. *Urban Renewal Agency of San Antonio v. Bridges Signs, Inc.*, 717 S.W.2d 701 (Tex. App. 1986) (no First Amendment issue raised); *Lynch v. Urban Redev. Auth. of Pittsburgh*, 91 Pa. Commw. 260, 496 A.2d 1331 (1985). Even where the constitutional issues have been addressed, the analysis is far from satisfactory. *See Lynch*, 91 Pa. Commw. at 218, 496 A.2d at 1336 (holding the First Amendment not implicated because "the authority did not ban advertising or signs from the Lynches' property, it only rejected a specific proposal for a fourteen by forty-eight foot billboard which would rise to a height of seventy-two feet"); *Linn Valley Lakes Property Owners Ass'n v. Brockway*, *supra*, 250 Kan. at 169, 824 P.2d at 951 ("[t]here is nothing constitutionally impermissible per se in a private agreement restricting signs in a residential neighborhood, and enforcement thereof does not constitute improper state action").

If full constitutional scrutiny is not given the restraints imposed by such restrictive covenants involving state actors, core First Amendment values fall by the wayside. One need not look any further than this case: under the restrictive covenant, as championed by the City and en-

forced by the Illinois courts, a manufacturer in the Industrial Park can advertise its products, but a resident cannot post a political sign. The City can proclaim its existence on its water tower, but a citizen cannot display his views on social issues. Products can be advertised, but thoughts may not be shared with those who might agree.

Nor does this necessarily end with expressive activity. The lower courts' opinions and orders invite landowners to join to create restrictive covenants to bar *any* protected activity of which they disapprove. What would prevent the formation and enforcement of a restrictive covenant that abortions should not take place in a specified area? A covenant that minorities cannot live on a certain block?

The Illinois courts' acceptance of this dual role is a dangerous invitation to governmental bodies to regulate through private agreements. Developers often complain that municipal officials use their authority to link development approval to restrictions or provisions relating to public works or social programs. *See Nollan v. California Coastal Comm'n*, 483 U.S. 835, 837 (1987) (unless the permit condition serves the same governmental purpose as the development ban, the restriction is not a valid land use regulation but "an out-and-out plan of extortion") (quoting *J.E.D. Assocs., Inc. v. Town of Atkinson*, 121 N.H. 581, 432 A.2d 12, 14-15 (1981)).

Prior to the appellate court's decision in this case, aggrieved individuals could challenge arbitrary excesses by municipal officials by filing suit and forcing the municipalities to follow their own zoning provisions and other ordinances which publicly establish the municipal development criteria. Now, if the state court's decision is allowed to stand, municipalities will be able to avoid constitutional scrutiny by seeking restrictive covenants and then by enforcing those covenants against later users of the property

through civil suits. Since municipalities may ultimately become property owners in virtually every development (streets, parkways, and other public areas are commonly dedicated to the municipality), the danger is real.[6]

The petitioner recognizes that this case involves only three billboards in a small area of a small city, in contrast to the millions of other permissible locations for billboards. Not unlike the three billboards in this case, only two of the millions of homes available for purchase in the United States were involved in *Shelley*. The Court in *Shelley* nevertheless acknowledged the potential for abuse inherent in the enforcement of restrictive covenants and saw the need to prevent the use of restrictive covenants to frustrate the free exercise of constitutional rights. That same need exists here.

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[6] The effect of "privatizing" the development authority of municipalities will be to force developers and subsequent property owners to adhere to a city's private restrictions, whether or not those private restrictions match the public ordinances of the city. The ability of municipal officials to threaten private civil litigation to challenge alleged violations of private deed restrictions will give municipal officials great leverage over individuals engaging in otherwise legitimate conduct. Similarly, the recent decisions of this Court ensuring the rights of private property owners to receive compensation for governmental restrictions which render properties valueless will be jeopardized if municipalities are able to avoid such actions by restricting development through private deed restrictions. *See Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Appellate Court of Illinois, First Judicial District, to review the Appellate Court's judgment and opinion.

Respectfully submitted,

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January 5, 1993

APPENDIX

In the Appellate Court of Illinois
First District, Fifth Division
No. 1-89-3080 — November 27, 1991

CITY OF ROLLING MEADOWS, an Illinois municipal corporation,

Plaintiff-Appellee,

v.

NATIONAL ADVERTISING COMPANY, a Delaware corporation, UNIVERSAL OUTDOOR, INC., an Illinois corporation, P.K. NEUSES, INC., an Illinois corporation, FIRST NATIONAL BANK OF ARLINGTON HEIGHTS, trustee under trust agreement dated May 13, 1971, and known as trust no. A176, and CITIZENS BANK & TRUST COMPANY, as trustee under trust no. 66-4801, and "UNKNOWN OWNERS,"

Defendants-Appellants.

Appeal from the Circuit Court of Cook County
Honorable Arthur L. Dunne, Judge Presiding.

PRESIDING JUSTICE LORENZ delivered the opinion of the court:

Following a bench trial, judgment was entered in favor of plaintiff, the City of Rolling Meadows (city), enforcing a restrictive covenant which prohibited off-premise billboards in an industrial park. Defendants now appeal and raise the following issues: (1) whether a previous Federal court action involving the city's zoning ordinance barred the present action as *res judicata*; (2) whether the issuance of permits to construct the billboards amounted to a vested property right; (3) whether the doctrine of *laches* prevented the city from enforcing the restrictive

covenant; (4) whether the city's enforcement of the covenant had a proper public purpose; (5) whether it was against the manifest weight of the evidence to find that the city did not abandon its right to enforce the covenant; (6) whether it was against the manifest weight of the evidence to find that the character of the property had not changed; and (7) whether enforcement of the restrictive covenant would violate the right to freedom of speech. For the following reasons, we affirm.

This action concerns the city's complaint for declaratory and injunctive relief to enforce a restrictive covenant which applied to property it owned in an industrial park in Rolling Meadows. Defendants, P.K. Neuses, Inc., First National Bank of Arlington Heights, and Citizens Bank & Trust Company, also owned property in the park subject to the covenant and leased portions of their property to defendants, National Advertising Company (National) and Universal Outdoor, Inc. (Universal), to erect and maintain billboards.

The restrictive covenant was recorded in 1957 against most of the lots in the industrial park and allowed any owner to bring legal action to enforce them. The covenant provides that:

> "Improvements erected on property subject to this declaration * * * shall not exceed forty-five (45) feet in height; [p]rovided, however, [t]hat water towers or tanks * * * may exceed this height with the written approval of the [Northwest Industrial Park, Inc.].
>
> * * *
>
> No billboards or advertising signs, except those identifying the name, business and products of the person or firm occupying the premises shall be permitted."

The covenant also gave Northwest Industrial Park the authority to generally supervise and enforce the covenant. That corporation was dissolved in 1966.

The city acquired property in the industrial park in 1960 and built a water tower on the property in 1961.

In 1962, the center line of Route 53 was recorded showing it would run through the industrial park and in 1963, 20.64 acres of the 201 acres in the park were condemned for its construction. Route 53 opened for traffic in 1966 and was, at the time of this action, a six-lane highway.

In 1983, National applied for two building permits from the city to erect advertising billboards on the property it leased in the industrial park. The city denied the permits because National's proposed billboards violated the city's zoning ordinance which limited the size and height of billboards and allowed only on-premise billboards. On-premise billboards advertise a business or product of a person or firm occupying the premises.

When its permits were denied, National filed a civil rights action against the city in Federal court. It alleged that the zoning ordinance violated the right to freedom of speech because it only allowed on-premise billboards and that the size and height restrictions of the ordinance were preempted by the Highway Advertising Control Act of 1971 (Ill. Rev. Stat. 1985, ch. 121, par. 501 *et seq.*). On the city's motion, the Federal district court dismissed National's complaint. On appeal, the reviewing court reversed that decision agreeing with National's argument that the zoning ordinance was preempted by State law. (*National Advertising Co. v. City of Rolling Meadows* (1986), 789 F.2d 571.) As a result of its decision, the court did not consider the freedom of speech issue. The case was remanded to the district court to "give National effective

relief from the existing ordinance." (*National*, 789 F.2d at 577.) The action of the district court, on remand, is not apparent from the record in this case.

After the Federal litigation was resolved, the city amended its zoning ordinance to comply with the Highway Advertising Control Act of 1971. National again applied for permits to erect two billboards on the property it leased in the industrial park. The city issued the permits on October 29, 1986, and National began construction of the billboards.

Universal also applied for and was granted a permit to construct a billboard on the property it leased in the park. Universal also began construction of the billboard.

In November of 1986, the city learned of the restrictive covenant, applicable to most of the property in the industrial park, which prohibited improvements over 45 feet high and allowed only on-premise billboards. On December 12, 1986, the city filed the present action, a complaint for declaratory and injunctive relief, against defendants alleging that National's and Universal's billboards violated the restrictive covenant because they would be more than 45 feet high and they would display off-premise advertising. Off-premise billboards advertised businesses, products, or services which were available or conducted at a location other than where the billboard was located.

The city requested a temporary restraining order to halt construction of the billboards. The trial judge denied the request and allowed National and Universal to complete construction of the billboards. Subsequently, the parties agreed that National and Universal could lease the billboards for off-premise advertising but the agreement would not prejudice the city's attempt to enforce the restrictive covenant in the present action.

Defendants moved to dismiss the complaint arguing that the covenant should not be enforced on the grounds of *res judicata*, *laches*, estoppel, public policy, changed character of the property, and the right to freedom of speech. The motion was denied.

Defendants answered the complaint and asserted the following as affirmative defenses: (1) the restrictive covenant violated the right to freedom of speech; (2) the city's enforcement of the covenant did not serve a public purpose for which public funds should be spent; (3) the character of the property had changed since the covenant was recorded; and (4) the city had abandoned the right to enforce the covenant.

Defendants also filed a motion for summary judgment on their affirmative defenses which was denied. The city, however, was granted summary judgment on the affirmative defenses of freedom of speech and public purpose.

Prior to trial, the parties stipulated to the following facts. The water tower on the city's property in the park was 80 feet high but there was no documentation that the water tower was approved by the Northwest Industrial Park as required in the covenant. Pursuant to the permits issued by the city, National built two billboards on property it leased in the park which were 55 feet and 11 inches high and 56 feet and 5 inches high. Also pursuant to a permit, Universal build one billboard which was 49 feet and 8 inches high. National and Universal offered their billboards for lease to "all comers" to display commercial and noncommercial messages.

In a bench trial on the remaining issues of changed conditions and abandonment, the following evidence was presented.

Rolf Campbell, the city's land use and planning expert, testified that when the city planned the area as an industrial park, it anticipated that there would be access from a highway such as Route 53. Further, Route 53 did not change the character of the industrial park and the development of the park was consistent with the covenant. The billboards in question were incompatible with the park because they were excluded by the covenant, architecturally incompatible with the present buildings, and provided two separate uses for one parcel which was intended to have only one use. If the covenant was enforced, there would be no hardship to the present owners because the property was being used for industrial purposes which was consistent with the intent of the covenant.

Allen Kracower, defendants' land use and planning expert, testified that Route 53 was a significant change on the property because of its size, traffic, and noise. Route 53 carried 100,000 to 150,000 cars per day through the park. He also testified that prohibiting billboards in the park was no longer relevant and that billboards were a reasonable use of the land in the park.

William McCann, defendants' real estate appraiser, testified that allowing the billboards would increase the value of the property without a detrimental impact to the other property in the park.

The trial judge found that the character of the property did not change since the time the covenant was recorded and that the city did not tolerate violations of the covenant which would have indicated an abandonment. The judge enforced the covenant and ordered National and Universal to remove the billboards. National, Universal, and their respective lessors now appeal.

OPINION

I.

National first argues that the Federal litigation operates as *res judicata* to the city's attempt to enforce the restrictive covenant in this action.

Under the doctrine of *res judicata*, the final judgment of a court of competent jurisdiction is conclusive of the rights of the parties and their privies and absolutely bars subsequent actions involving the same claims or demands by the same parties or their privies. (*Catlett v. Novak* (1987), 116 Ill. 2d 63, 506 N.E. 2d 586.) The bar not only extends to the issues that were actually decided in the former proceeding but also to any other issues properly involved by the subject matter which might have been raised or decided. *Best Coin-Op, Inc. v. Paul F. Ilg Supply Co.* (1989), 189 Ill. App. 3d 638, 545 N.E. 2d 481.

Although the action of the Federal district court on remand is not apparent from the record in this case, the city does not challenge the finality of that decision. The parties primarily dispute whether the Federal court action and the present case involve the same claim or demand.

Illinois courts have used either the " 'same evidence' " test or the " 'transactional' " test to determine whether there is an identity of the causes of actions, however, the supreme court has not expressly adopted either test. *Best Coin-Op*, 189 Ill. App. 3d at 652, 654, 545 N.E. 2d at 490-91.

Under the same evidence test, *res judicata* will apply if the evidence needed to sustain the second cause of action would have sustained the first cause of action. (*Best Coin-Op*, 189 Ill. App. 3d 638, 545 N.E. 2d 481.) Here, the city's action to enforce the restrictive covenant neces-

sarily requires different evidence than the evidence that was required in the Federal court action involving the zoning ordinance. Although both actions involved the restriction of billboards, the Federal action was based on the city-wide zoning ordinance and this action was based on the restrictive covenant recorded in 1957 against most of the property in the industrial park. This action could have been sustained without reference to the zoning ordinance.

Under the "transactional" test, different theories of relief constitute a single cause of action if a single group of operative facts give rise to the assertion of relief. (*Best Coin-Op*, 189 Ill. App. 3d 638, 545 N.E.2d 481.) In this case, the Federal action was brought by National after it was denied permits in 1983. The present action was brought by the city after it granted National permits in 1986. Although both actions involve National's attempt to erect billboards in the park, they stemmed from different conduct at different times.

National relies on *Exchange National Bank v. City of Des Plaines* (1975), 32 Ill. App. 3d 722, 336 N.E.2d 8, where plaintiff challenged the application of defendant's zoning ordinance to its property. As an affirmative defense, defendant raised the issue of a restrictive covenant also applicable to the property. In this case, National contends that based on *Exchange*, the city could have and should have raised the issue of the restrictive covenant in the Federal court action. However, *Exchange* does not assist in resolving the issue presented here because it did not consider the issue of *res judicata*.

National also relies on *Furgatch v. Butler* (1988), 188 Ill. App. 3d 1060, 545 N.E. 2d 140, to support its argument that *res judicata* applies in this case. In *Furgatch* the court found that a constitutional challenge to a zoning

ordinance was barred under *res judicata* because it could have been raised in a prior proceeding which challenged the denial of a permit based on the zoning ordinance. In *Furgatch*, distinguished from the present case, both actions involved the application of the zoning ordinance.

The present action stems from different facts and requires different evidence than the Federal court litigation and, as a result, it was not barred under *res judicata*.

II.

National also argues that it had a vested right in the Federal court judgment and the permits issued by the city.

National relies on *Arnold & Murdock Co. v. Industrial Comm'n* (1924), 314 Ill. 251, 145 N.E. 342, which stated that a judgment is a vested property right which cannot be destroyed by giving a subsequently-enacted statute retroactive effect. *Arnold* does not resolve the issue in the present case which does not involve the retroactive effect of a statute on a judgment.

In *Leisuretime Recreation Center VI, Inc. v. Byrne* (1981), 93 Ill. App. 3d 489, 417 N.E. 2d 658, which National also relies on, the court stated that when a party has made a substantial change in position, by incurring expenditures and obligations in reliance on a building permit, the permit may ripen to a vested right depending on the totality of the circumstances.

National contends that in reliance on the permits, it incurred $40,000 to construct each billboard. However, from the time National leased the property in the park, it had constructive notice of the restrictive covenant, which was recorded in 1957, prohibiting billboards. Further, when

the city filed the present action six weeks after it issued the permits, National had not yet completed construction of the billboards. National was only allowed to complete the billboards because the city's request for a temporary restraining order was denied. Under these circumstances, National did not acquire a vested right in the permits.

III.

Universal argues that *laches* bars the city from enforcing the restrictive covenant.

Under the doctrine of *laches*, a party may be precluded from asserting a claim when he unreasonably delays raising that claim which prejudices the opposing party. (*Tully v. State* (1991), 143 Ill. 2d 425, 574 N.E.2d 659.) It is within the trial court's discretion to apply the doctrine of *laches*. *City of Rochelle v. Suski* (1990), 206 Ill. App. 3d 497, 564 N.E.2d 933.

Universal relies on *City of Rochelle* to support its argument. In that case, defendant owned a trailer park in which mobile homes were installed. In 1987, the city gave defendant notice that three of the mobile homes encroached on its property. Those homes were installed between 1969 and 1974 pursuant to permits issued by the city in 1968 or 1969. Removal of the homes would have cost defendant $25,000 and the city did not establish a need for the property. The appellate court found that *laches* may have prevented the city from asserting that the homes encroached on its property and remanded the case to the trial court for a determination of that issue.

Unlike *City of Rochelle*, the city in this case did not delay an unreasonable length of time after it issued the permit in asserting the restrictive covenant. The city filed

this action to assert its rights under the restrictive covenant within six weeks after the permit was issued to Universal. Although Universal also relies on the city's actions toward National to support its argument, those actions could not have prejudiced Universal. As a result, in this case the trial judge did not abuse his discretion in denying Universal's claim of *laches*.

IV.

Both National and Universal argue that the city cannot enforce the restrictive covenant because it does not serve a proper public purpose.

Under the State constitution, public funds and property can only be used for public purposes. (Ill. Const. 1970, art. VIII, § 1(a).) Public funds cannot be devoted to a purely private purpose. (*O'Fallon Development Co. v. City of O'Fallon* (1976), 43 Ill. App. 3d 348, 356 N.E.2d 1293.) Whether acting in its proprietary or governmental capacity, the test is whether the attempted private use of municipal property subserves the public interest and benefits a private individual or corporation only incidentally. (*O'Fallon Development Co. v. City of O'Fallon* (1976), 43 Ill. App. 3d 348, 356 N.E.2d 1293.) In *O'Fallon*, which Universal relies on, the court held that the city could not allow a private corporation to advertise on the city's water tower.

Unlike *O'Fallon*, the present case does not involve the use of public money or property for private purposes. The city is acting in its own interest to enforce the covenant applicable to its property in the industrial park. Aesthetics and traffic safety are valid policy reasons for government regulation of billboards. (*National Advertising Co. v. Village of Downers Grove* (1990), 204 Ill. App. 3d 499, 561 N.E.2d 1300.) Similarly, the city has a valid public purpose

to achieve the same objectives through enforcement of the restrictive covenant in this case.

V.

National and Universal also argue that the trial judge erred when he found, after a bench trial, that the city did not abandon its right to enforce the covenant.

Restrictive covenants will not be enforced when property owners have acquiesced in prior violations of the covenants. (*Rogers v. City of Jerseyville* (1990), 196 Ill. App. 3d 136, 552 N.E.2d 1314.) However, minor violations of a restriction do not prohibit subsequent enforcement of the covenant. (*Amoco Realty Co. v. Montalbano* (1985), 133 Ill. App. 3d 327, 478 N.E.2d 860.) The trial judge's decision after a bench trial will not be disturbed on review unless it was against the manifest weight of the evidence. *Commercial Mortgage & Finance Co. v. Life Savings* (1989), 129 Ill. 2d 42, 541 N.E.2d 661.

National and Universal contend that the evidence at trial established that the city acquiesced in a prior violation of the covenant when it constructed the water tower. The tower was 80 feet high. Although the covenant allowed construction of a water tower in excess of 45 feet with written approval of the Northwest Industrial Park, the city did not produce evidence at trial that it received such approval. The trial judge found that the city's failure to produce written approval did not establish that the tower was constructed without such approval. It cannot be said that this determination was against the manifest weight of the evidence. Further, even if there was no approval for the water tower, a minor violation of a covenant does not establish that the city abandoned the covenant.

National and Universal also contend that the city acquiesced in a violation of the covenant when it issued permits to construct the billboards in question. The evidence at trial established that the city learned of the restrictive covenants one month after it issued the permits. It immediately filed the present action to enforce them. The billboards were only completed because the trial judge denied the city's request for a temporary restraining order. As a result, the city's act of issuing the permits did not automatically establish that it abandoned the covenants.

The trial judge's decision that the city did not abandon the right to enforce the covenant was not against the manifest weight of the evidence.

VI.

National and Universal also argue that the trial judge erred when he found that enforcement of the restrictive covenant was equitable because the character of the industrial park did not change.

A restrictive covenant should not be enforced if the character and environment of the property has changed to the extent that the objective of the restriction cannot be accomplished by its enforcement or if it would be unreasonable or oppressive to enforce it. (*Rogers*, 196 Ill. App. 3d 136, 552 N.E.2d 1314.) The decision of the judge after a bench trial will not be disturbed on appeal unless it was against the manifest weight of the evidence. *Commercial*, 129 Ill. 2d 42, 541 N.E.2d 661.

National and Universal contend that the evidence at trial showed Route 53 changed the character of the industrial park to such an extent that enforcement of the covenant was unreasonable. However, the testimony of the

parties' experts, Campbell and Kracower, conflicted on this point. Campbell testified that when the area was planned as an industrial park, it was expected that there would be access to the area from a highway such as Route 53. Campbell also testified that the character of the park had not changed because it was being used as an industrial park consistent with the intent of the covenant. On the other hand, Kracower testified that Route 53 was a significant change to the industrial park because of its size, the amount of traffic it carried, and the noise it caused. Further, he testified that billboards were a reasonable use of the land near Route 53.

The trial judge, as the trier of fact, was required to resolve the conflicting testimony and his decision that the character of the property had not changed was supported by the evidence. Most notably, Route 53 was consistent with the plan for the industrial park and, even if the covenant was enforced, the owners of the property in the park could continue to use their property for industrial purposes. Accordingly, enforcement of the covenant was not unreasonable and the decision of the judge was not against the manifest weight of the evidence.

VII.

Lastly, National and Universal argue that the restrictive covenant cannot be enforced because it violates their right to freedom of speech. They contend that the paragraph of the covenant which only allows on-premises billboards restricts their right to display noncommercial messages.

National and Universal rely on *Shelley v. Kraemer* (1948), 334 U.S. 1, 92 L. Ed. 2d 1161, 68 S. Ct. 836, where the Supreme Court held it would not enforce a restrictive

covenant that would violate constitutional rights. They argue that the restrictive covenant prohibiting off-premise billboards violates their right to free speech relying on *Metromedia, Inc. v. City of San Diego* (1981), 453 U.S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882. In *Metromedia*, the Supreme Court held that an ordinance permitting on-premise commercial advertising but prohibiting other commercial advertising and noncommercial advertising violated the right to freedom of speech. The court found that the ordinance could value commercial messages relating to on-premise business over commercial messages relating to off-premise business. However, the ordinance could not protect commercial speech more than noncommercial speech. "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." *Metromedia*, 453 U.S. at 513, 69 L. Ed. 2d at 818, 101 S. Ct. at 2895.

National and Universal argue that under *Metromedia* the restrictive covenant unconstitutionally prohibits the display of noncommercial messages because it allows only the display of on-premise commercial message. They urge this court to hold that enforcement of the restrictive covenant violates freedom of speech.

National and Universal ignore, however, the fact that their proposed billboards violate the height restrictions of the covenant. The covenant prohibits improvements over 45 feet high. The three billboards which National and Universal constructed were between 49 feet and 56 feet high, exceeding the limitation. Regardless of the message that their billboards may carry, whether it is commercial or noncommercial, there is no question that

the billboards violate the height restriction of the covenant. As a result, whether enforcement of the covenant would violate freedom of speech is not at issue. Even if this court were to find that the restrictive covenant violated the freedom of speech, the height restriction of the covenant would still bar National's and Universal's billboards.

For the foregoing reasons, the decision of the trial judge is affirmed.

Affirmed.

GORDON and McNULTY, JJ., concur.

Order of the Supreme Court Denying Leave to Appeal

(Letterhead of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

October 7, 1992

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No. 73953—City of Rolling Meadows, etc., respondent, v. National Advertising Company, etc., et al., petitioners. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 29, 1992.

**Order of the Supreme Court
Denying Leave to Appeal**

(Letterhead of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

October 7, 1992

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No. 73955—City of Rolling Meadows, etc., respondent, v. National Advertising Company, etc., et al. (Universal Outdoor, Inc., etc., et al., petitioners). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 29, 1992.

Supreme Court, U.S.
FILED
FEB 4 1993
OFFICE OF THE CLERK

No. 92-1173

In The
Supreme Court of the United States
October Term, 1992

NATIONAL ADVERTISING COMPANY and UNIVERSAL OUTDOOR, INC.,
Petitioners,

v.

CITY OF ROLLING MEADOWS, an Illinois Municipal Corporation,
Respondent.

Petition for Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 92-1173

In The

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October Term, 1992

NATIONAL ADVERTISING COMPANY and
UNIVERSAL OUTDOOR, INC.,
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v.

CITY OF ROLLING MEADOWS,
an Illinois Municipal Corporation,
Respondent.

Petition for Writ of Certiorari to the Appellate
Court of Illinois, First Judicial District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. SUMMARY OF ARGUMENT

This is not a First Amendment case. Petitioners arguments, although stated in constitutional terms, do not raise an issue of constitutional proportions. Nor is this a zoning case or a case in which an ordinance, law, statute, or other governmental regulation is brought into question.

Rather, this case involves the enforcement of a recorded restrictive covenant which limits the height of signs which may

be constructed in an industrial park, allows only on-premise signs, i.e., those signs which identify the occupant of the premises, and which empowers any owner of property subject to the covenant to enforce the covenant against any party in violation thereof. The restrictive covenant was not imposed by the City, nor is the covenant a City of Rolling Meadows ordinance or regulation. The City owns property, in its proprietary capacity, in the industrial park that is subject to the covenant, and, therefore, may enforce the covenant against other property owners in the covenant area that intend to violate the covenant.

Petitioners voluntarily acquired their leasehold interests in the property which is subject to the restrictive covenant but have admittedly erected billboards that exceed the covenant's height restriction and which contain off-premise advertising. Petitioners do not contend that any of the several other owners of property subject to the covenant could not enforce it.

Petitioners go to great lengths, as they must, to attempt to turn this property law case into a constitutional case. Petitioners contend that the City of Rolling Meadows, by virtue of its municipal status, cannot enforce the covenant. For that proposition, Petitioners cite several cases in which this Court has reviewed governmental ordinances and regulations, each one distinguishable from and inapplicable to this case, and a few cases in which courts have reviewed restrictive covenants, none of which even arguably support the contention that Rolling Meadows' municipal status disqualifies it from enforcing the restrictive covenant. In truth, Petitioners are unable to cite any authority for the proposition that a municipality may not enforce a restrictive covenant, on property it holds in its proprietary capacity, against a party that voluntarily acquired an interest in property subject to that restrictive covenant, which covenant empowers any party subject thereto to enforce the covenant against any party in violation thereof, and which covenant the municipality did not impose.

Petitioners' next attempt to impose a constitutional issue comes in the form of an argument that the covenant violates the First Amendment by banning non-commercial advertising. For this contention, Petitioners must make up, or at least stretch, facts; the restrictive covenant makes no commercial/non-

commercial distinction, whatever. What the covenant does ban is off-premise signs, a prohibition which has been held to be valid by this court.

Finally, Petitioners revert to concocting hypothetical fact situations under which a constitutional issue would be raised, and then asking this Court to grant a writ of certiorari to resolve those issues.

The Court should deny certiorari because there is no constitutional issue in this case, and because, try as they might, Petitioners cannot create one.

II. ARGUMENT

Resolution of this case has and will turn on rules of property law, not constitutional law. This case is not a zoning case and does not involve an ordinance, law, statute, or other municipal regulation. Rather, this case involves the enforcement, by the City of Rolling Meadows in its proprietary capacity, of a restrictive covenant on a parcel of property in a private industrial park. The developer of this industrial park imposed the covenant, and, thereafter, the City and Petitioners voluntarily acquired interests in property subject to the restrictive covenant. Petitioners have erected signs that violate the covenant in two respects, they are higher than the covenant's height limitation and are off-premise signs while only on-premise signs are allowed under the covenant.

The effect of the City's actions under the restrictive covenant, which Petitioners argue requires granting a writ of certiorari, is part of the bargain Petitioners' voluntarily assumed when they acquired their respective interests in the industrial park, an effect which Petitioners are now attempting to avoid. Petitioners argue that the City's municipal status renders its enforcement of a restrictive covenant subject to procedures otherwise not required, e.g., the advancement of a justification for enforcement and of a "public purpose" and heightened constitutional scrutiny. Yet, Petitioners can cite no cases which stand for that proposition. Unable to relieve themselves of the mandate of the restrictive covenant through the advancement of concepts of property law, Petitioners try to generate constitutional issues where none exist.

A. THE CITY'S ENFORCEMENT OF THE RESTRICTIVE COVENANT IS NOT UNCONSTITUTIONAL.

Petitioners allege that the City's enforcement of the restrictive covenant is unconstitutional because 1) "the fact that the (Petitioners') signs may have violated the restrictive covenant's height restrictions does not end the constitutional analysis"; 2) "the City failed to offer any justification for enforcement of the restrictive covenant"; and 3) the restrictive covenant favors "a certain type of commercial speech over non-commercial and other types of commercial speech". (Petition at Page 17).

1. THE CITY NEED NOT ALLEGE A PUBLIC PURPOSE OR NECESSITY TO ENFORCE THE RESTRICTIVE COVENANT.

For the proposition that any restriction on advertising signs must be justified by a public public purpose or necessity in order to pass constitutional muster, Petitioners cite *Heffron v. International Soc'y for Krishne Consciousness*, 452 U.S. 640, 649 (1981), *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 556 (2nd Cir. 1990).

Heffron involved a rule of a public corporation, a municipal ordinance was at issue in *Central Hudson*, and a state public service commission regulation was litigated in *Babylon*. Because Rolling Meadows is not seeking to enforce a rule, ordinance, or other governmental regulation, citation of each of Petitioners' cases is inappropriate.

The trial court held that Rolling Meadows owned this property in its proprietary capacity and that the City was not enforcing an ordinance:

> [T]his is a proprietary interest, and they [the Respondent] are attempting to assert a covenant. They are not attempting to impose an ordinance on the lessees of this property.

Rep. Proc. 3/24/88, page 17, lines 6-9.

In fact, Petitioners admit that no ordinance is at issue in this case when they argue that the City ". . . cannot do indirectly, through the use of a restrictive covenant, what they cannot do directly through ordinance . . . ", and that ". . . this case raises the question of a municipality's ability to regulate expressive conduct through the enforcement of a restrictive covenant, rather than by statute or ordinance. . . . " (Petition at Page 10). Thus, Petitioners' citation of *Heffron, Central Hudson,* and *Babylon* in a case involving the enforcement of a restrictive covenant and not dealing with a rule, ordinance, or regulation of a governmental body is inappropriate.

Petitioners' argument also ignores the fact that they acquired an interest in the property with notice, actual or constructive, of the recorded covenant which prohibits their signs.

The City need offer no justification for enforcing the covenant. Rolling Meadows' authority to enforce the covenant is derived from the covenant itself:

> [Any owner] . . . shall have the right to sue for and obtain an injunction . . . to prevent the breach of or to enforce the observance of the restrictions above set forth.

R. C23, paragraph O. Petitioners have cited no cases which stand for the proposition that Illinois law requires a "public purpose" as a precondition to enforcement of a private restrictive covenant.

The signs which Petitioners seek to place in the industrial park exceed the covenant's height restriction and contain off-premise signs in violation of the covenant. Yet, Petitioners assert the First Amendment to deprive the City of its right under the covenant to compel compliance therewith.

However, *O'Fallon Devel. Co. v. City of O'Fallon,* 43 Ill. App. 3d 348, 356 N.E.2d 1293 (5th Dist. 1976), held that:

> [W]hile engaged in activities in a proprietary capacity, no distinction has been drawn between a municipality and a private corporation.

O'Fallon, 43 Ill. App. 3d at 353, 356 N.E.2d at 1298. As such, the City may enforce the restrictive covenant in its proprietary capacity as any private corporation could.

2. THE OVERBREADTH DOCTRINE CANNOT BE APPLIED TO INVALIDATE THE RESTRICTIVE COVENANT.

Petitioners next characterize the restrictive covenant as "overbroad". (Petition at Page 18). The "overbreadth doctrine" requires that an ordinance be invalidated if it is fairly capable of being applied to punish people for constitutionally protected speech or conduct. *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). Under the overbreadth doctrine, however, an ordinance will not be unconstitutionally broad if a limiting construction or partial invalidation can be made to remove the seeming threat or deterrence to constitutionally protected expression. *See Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965). As this Court has said, ". . . application of the overbreadth doctrine . . . is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. . . ." *Broaderick v. Oklahoma*, 413 U.S. 601, 613 (1973). Petitioners' overbreadth argument must fail for two reasons.

First, and most importantly, the City, as discussed above, does not seek enforcement of an ordinance, but, rather, a private restrictive covenant. Petitioners have cited no cases in which the overbreadth doctrine had been applied to a private restrictive covenant.

Second, the sign restriction does not punish constitutionally protected speech or conduct. The covenant is silent as to the nature of permissible advertising. Rather, the sign restriction prohibits off-premise signs while allowing on-premise advertising, a restriction which has been held constitutional by this Court in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (Off-site billboards may be prohibited while on-site billboards are permitted). The covenant does not limit the content of the signs in the constitutional sense. Rather, the signs on the property subject to the covenant must identify the business conducted there. So if, for example, a charity owned property subject to

the covenant, the sign restriction would not forbid advertisement of that charity's "non-commercial" cause. Thus, Petitioners' allegation that the covenant prohibits non-commercial advertising is simply wrong.

3. THE RESTRICTIVE COVENANT DOES NOT TREAT CERTAIN NON-COMMERCIAL SPEECH PREFERENTIALLY OVER OTHER NON-COMMERCIAL SPEECH.

Petitioners final constitutional argument is that the covenant treats commercial speech preferentially over noncommercial speech in violation of *Metromedia*. (Petition at Page 21).

To begin, the Court need not reach this argument. Regardless of whether the covenant prohibits non-commercial speech, as petitioners contend, Petitioners' signs admittedly violate the covenant's height limitation. As the Illinois Appellate Court stated:

> National and Universal ignore, however, the fact that their proposed billboards violate the height restrictions of the covenant. The covenant prohibits improvements over 45 feet high. The three billboards which National and Universal constructed were between 49 feet and 56 feet high, exceeding the limitation. Regardless of the message their billboards may carry, whether it is commercial or noncommercial, there is no question that the billboards violate the height restriction of the covenant. As a result, whether enforcement of the covenant would violate freedom of speech is not at issue. Even if this court were to find that the restrictive covenant violated the freedom of speech, the height restriction of the covenant would still bar National's and Universal's billboards.

Rolling Meadows v. National Advertising Co., 228 Ill. App. 3d 737, 747, 593 N.E.2d 551, 560, (1st Dist. 1991).

Furthermore, even if the covenant made a commercial/non-commercial distinction, Petitioners' signs, which Petitioners admit are "off-premise signs" (Petition at Page 5), would still be prohibited under the covenant's total ban on all off-premise signs, whether commercial or non-commercial. These facts, alone, are enough to deny certiorari.

Nevertheless, because, admittedly and as discussed above, no ordinance is involved in this case, citation of *Metromedia,* which involved a zoning challenge and which held that the City of San Diego could not zone out commercial billboards, is inappropriate.

That notwithstanding, Petitioners incorrectly apply *Metromedia.* Petitioners contend that the language of the restrictive covenant is virtually the same as the language of the ordinance in *Metromedia.* (Petition at Pages 20-21). However, the zoning ordinance in *Metromedia* contained a general ban on non-commercial signs with various enumerated exceptions. This Court stated:

> With respect to noncommercial speech, the city may not choose the appropriate subjects for public disclosure: "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth. (Citation omitted) Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones.

Metromedia, 453 U.S. at 515.

It is to be noted that the covenant is this case was not the choice of the City, nor was it placed on the industrial park property by the City. Therefore, no governmental action subjected the properties in the industrial park to the restrictive covenant. Petitioners and the City acquired their interests in the property subject to the original developer's previously recorded restrictive covenant.

The covenant which Rolling Meadows seeks to enforce plainly and simply allows on-premise signs while prohibiting off-premise signs. This Court, in *Metromedia,* held that banning off-premise signs is permitted:

> Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted.

Metromedia, 453 U.S. at 512.

The restrictive covenant in this case does not prohibit noncommercial signs while making exceptions for the allowance of others. In fact, the covenant makes no commercial/non-commercial distinction, whatever. The covenant simply allows on-premise signs while not allowing off-premise signs. Thus the evil which was held to violate the constitution in *Metromedia,* i.e., a municipality choosing to allow certain types of non-commercial speech while prohibiting others, is not present in this case.

B. THE "STATE ACTION" DOCTRINE IS INAPPLICABLE BECAUSE THE CITY IS NOT IMPOSING OR ENFORCING AN ORDINANCE.

Petitioners argue that ". . . by misapprehending the state action doctrine, the Illinois Courts have allowed the City to obtain, through a civil suit, the regulation of private property in a manner at odds with the constitution. . . ." (Petition at Page 14). In support of this argument, Petitioners cite *Lugar v. Edmonton Oil Co.,* 457 U.S. 922 (1982), *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974), *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975), and *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). Citation of these authorities is inappropriate. *Lugar* and *Burton* involved state statutes, *New York Times* dealt with a state rule of law, *Southeastern Promotions* considered a municipal board's denial of an application based upon anticipated violation of a municipal ordinance and of a state statute, and in *Jackson,* it was held that the actions of a utility company did not constitute "state action".

What Petitioners have done is state a proposition of law, i.e., ". . . state action applies to all actions of the state, not just

those where the state acts in the usual course, e.g., pursuant to statute or regulation . . .", (Petition at Page 14), without any citation to authority therefor. Then, Petitioners enumerate a body of "state action" law, which, while not incorrect, does not support the proposition, and which is inapplicable to this action to enforce a restrictive covenant.

The First Amendment, itself, resolves this issue:

> Congress shall *make* no law . . . abridging the freedom of speech . . .

U.S. Const. amend. I. [Emphasis added.] The City did not impose or create the covenant. Nor does Rolling Meadows seek to enforce a statute or governmental regulation. Rather, the City enforced the restrictive convenant subject to which it and Petitioners voluntarily acquired their respective interests in the industrial park.

Petitioners also argue, relying on *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923), that "the City reached out to strike down an expressive activity it did not like" by bringing this action to enforce the restrictive covenant, thus establishing "state action". Seemingly, this is an argument that the City's filing of a civil action to enforce a private restrictive covenant is inherently unconstitutional.

Petitioners admit that the sign restrictions in the restrictive covenant are ". . . not *per se*, a violation of the First Amendment of the U.S. Constitution. . . ." R. C806. If the covenant's restriction of signs is not unconstitutional, enforcement of the covenant cannot be unconstitutional.

Petitioners argue, relying on *Shelley v. Kraemer*, 334 U.S. 1 (1948), that, even if the City's enforcement of the restrictive covenant is not "state action", judicial enforcement thereof is. This logic fails in that there first must be a violation of the constitution, the judicial enforcement of which constitutes "state action", before the Fourteenth Amendment will inhibit judicial enforcement thereof. *Shelley*, 334 U.S. at 8.

Furthermore, even assuming "state action" as defined in *Shelley*, that case is distinguishable. The covenant in *Shelley*,

which restricted ownership of property by persons of certain races, was *per se* unconstitutional, while Petitioners admit that the sign restriction in the restrictive covenant in this case is not *per se* a violation of the First Amendment. R. C806. Petitioners have cited no cases in support of the contention that what is consitutional becomes unconstitutional by virtue of judicial enforcement.

Moreover, *Shelley* carefully distinguishes the covenants this Court was there construing as applying to a racial class of persons and not seeking ". . . to proscribe any particular use of the affected properties . . . ." *Shelley*, 334 U.S. at 10. Unquestionably, the restrictive covenant which Rolling Meadows seeks to enforce restricts the use of the affected properties. The issues in this case are in no way analogous to the racial discrimination issues in *Shelley*.

C. THE CITY'S ENFORCEMENT OF THE RESTRICTIVE COVENANT DOES NOT ACCOMPLISH WHAT THE CITY COULD NOT DO THROUGH ORDINANCE; THE CITY MAY REGULATE, AND EVEN BAN, BILLBOARDS.

Petitioners argue that the City could not regulate Petitioners' billboards by ordinance, and that, therefore, it should not be allowed to enforce the restrictive covenant:

> [T]his case, therefore, presents the Court with the opportunity to demonstrate to municipalities that they cannot do indirectly, through the use of a restrictive covenant, what they cannot do directly through ordinance.

(Petition at Page 10).

However, while not germane to the issue here, the Illinois Supreme Court has determined whether a home rule municipality in Illinois, such as the City of Rolling Meadows, can regulate billboards. A unanimous Supreme Court held that the authority of home rule municipalities to regulate billboards was not preempted by Illinois statute and, thus, home rule municipalities may so regulate, even to the point of totally banning outdoor advertising signs. *Scadron v. City of Des Plaines*, No. 72848 (Ill.

November 19, 1992) (WESTLAW 1992 WL 337925) (Answering questions certified by 7th Cir. order dated November 18, 1991, in *Scadron v. City of Des Plaines,* No. 91-1083.)

Scadron repudiates the holding of *National Advertising Co. v City of Rolling Meadows*, 789 F.2d 571 (7th Cir. 1986), which Petitioners cite in their Statement of the Case, a case involving two of the parties to this case, and which held that even a home rule municipality could not alter the Illinois Highway Advertising Control Act of 1971 scheme because it would prevent the state as a whole from carrying out the federal Highway Beautification Act of 1970, which Illinois must carry out in order to receive federal highway funds.

The City may regulate or completely ban billboards under Illinois law, contrary to Petitioners' argument.

D. PETITIONERS' HYPOTHETICALS DO NOT FORM A BASIS UPON WHICH CERTIORARI CAN BE GRANTED.

Petitioners' final argument is that this Court should grant a writ of certiorari in order to create a law preventing municipalities from "regulating through restrictive covenants". (Petition at Page 21). Petitioners argue that ". . . if the state court's decision is allowed to stand, municipalities will be able to avoid constitutional scrutiny by seeking restrictive covenants and then by enforcing those covenants against later users of the property through civil suits . . . ." (Petition at Pages 23-24).

This case, however, does not involve a municipality that sought a restrictive covenant. Rolling Meadows acquired its property three years after the covenant had been recorded by the developer of the industrial park; the covenant was then in existence and part of the bargain running with the land. The City did not impose, create, or seek the restrictive covenant.

Petitioners lapse deeper into a hypothetical argument when they state:

> There is nothing to prevent Illinois municipalities from joining with other landowners to create covenants which restrict the exercise of religious, voting, or

> abortion rights. Municipalities could even attempt to achieve these goals by conditioning the grant of privileges, such as building permits, on the applicant's agreement to enter into a restrictive covenant. These scenarios are egregious, and they are not distinguishable in substance from this case.

(Petition at Page 12). What Petitioners are seeking is an advisory opinion on facts which are not part of the record in this case.

III. CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue.

Respectfully submitted,

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